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No. 160

In the Supreme Court of the United States

OCTOBER TERM, 1968

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Section 8(a)(1) — 10

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312-962—68

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 38a–48a) is not yet officially reported. The Board's decision and order (Pet. 1a–37a) are reported at 164 NLRB No. 2.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1968 (Pet. 38a). The petition for a writ of certiorari was filed on June 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's conclusion that the employer met its obligation to bargain with the union representing the employees at the old plant, concerning the effects of a transfer of operations to a new plant some 35 miles away.

2. Whether, in the circumstances of this case, the Board properly concluded that the employer was not obligated to recognize and bargain with the union as the representative of the employees at the new plant.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. *et seq.*), are set forth in the Appendix to the petition, pp. 61a–62a.

STATEMENT

For many years, the Pierce Governor Company engaged in the manufacture and sale of automotive parts at a plant in Anderson, Indiana. In 1941, the petitioner International Union was certified by the Board as the statutory bargaining representative of the production and maintenance employees at the Anderson plant (J.A. 176).[1] Thereafter petitioner and the Company negotiated successive collective bargaining contracts, the last of which expired on October 30, 1964 (J.A. 99–133). Petitioner participated in these nego-

[1] "J.A." refers to the portions of the record printed in the Joint Appendix to the briefs in the court below.

tiations with its Local 940, and the Company has recognized that the International and the Local act as a joint representative in negotiating and administering the contracts (J.A. 201, n. 2; 103, 104).

Negotiations for a new contract began in September 1964, about two months before the last contract expired. After several bargaining sessions, the Union became dissatisfied with the progress of negotiations and, on November 6, 1964, initiated a strike (J.A. 178, 202; 40). At the time the strike began, there were about 202 employees in the bargaining unit at the Anderson plant (J.A. 8).

At the contract negotiation meeting of December 16, 1964, the Company attorney and chief negotiator Donald Strutz referred to the Union's complaints about the old and dilapidated condition of the Anderson plant and explained that the Company had received a variety of offers from other communities to induce the Company to relocate its facilities. Strutz said that the town of Upland, Indiana, about 35 miles from Anderson, had made the "most attractive offer" and that the Company considered it "economically advantageous" to move there (J.A. 202; 159–160, 164). However, Strutz added, the Company was:

> * * * more than willing to bargain with [the] committee and the Union concerning the relative advantages and disadvantages of such a move and to consider all arguments which the Union may propose to overcome what appears to us to be the obvious economical advantage of making this move. [J.A. 160.]

Strutz recommended that bargaining about a new labor agreement be suspended temporarily to permit full negotiations about the contemplated plant removal; he added that there were still "many contingencies to be worked out" before the Company became "finally committed to make the move" (J.A. 160).

The Union answered that it wanted to bargain for an agreement covering (1) the operation of the Anderson plant so long as it remained at that location; and (2) the effects on the Anderson employees of a transfer of operations to some other location (J.A. 203, 179; 17–18, 162–164). The Union did not request bargaining about the propriety of the plant removal itself. At the conclusion of the meeting, the Company and the Union each submitted proposals for the terms of an interim agreement for the Anderson plant (J.A. 179–180; 18, 36–37, 41–42, 173).

At the next meeting of the parties on December 22, 1964, the Union asked that the Company "guarantee" the transfer of all Anderson employees to the new location. In reply, the Company offered to give consideration to Anderson employees who apply at the Upland plant for employment, with retention of seniority for all those hired (J.A. 19, 160). However, the Company gave three reasons why it would not "guarantee" the transfer of *all* Anderson employees: (1) certain employees were physically unable because of age or health to perform a full day's work; (2) certain employees had not been "delivering a fair day's work," although physically capable; and (3) certain employees had become "unfitted for further

employment" with the Company because of misconduct during the strike (J.A. 203; 19–20). The parties then specifically referred to and discussed several employees in the first category (J.A. 20).

The parties met again on December 31, 1964, at which time the Company announced that it had now committed itself to moving to Upland and had directed a contractor to start construction of a new building there on January 4, 1965 (J.A. 12–13, 21, 43, 47, 50). The Union renewed its demand for a Company guarantee of transfer rights for all Anderson employees, and the Company again offered to consider for employment any applicant from Anderson and to preserve seniority for all those hired (J.A. 47). The Company also announced its willingness to grant severance pay to those who were not hired (J.A. 204; 174). In response to a Union question, the Company stated that as of that time no jobs had been "promised" to the town of Upland (J.A. 47).

On January 9, 1965, when the parties met again, the Union took the position that it did not want to bargain for an interim contract for the Anderson plant but wanted to bargain on pay rates at the Upland plant. The Company replied that it was not obligated to bargain with the Union concerning pay rates for Upland employees, who had the right to choose their own bargaining representative (J.A. 43). The Union then proposed to discuss, person-by-person, which of the employees on the seniority list would be transferring from Anderson to Upland. The Company refused, on the ground that it had inadequate information as to the amount of business it would have at

Upland and "how much help we would need" (J.A. 44). However, the Company reiterated its earlier offer to give consideration to Anderson applicants, with seniority for those hired and separation pay for those not transferred (J.A. 204; 44).

At the January 20 meeting, an employee subcommittee, which the Union had formed at the suggestion of a Federal Mediator, renewed the demand for a discussion of the suitability of each employee on the Anderson seniority list for transfer to Upland. But, when two members of the subcommittee remarked that they would not transfer to Upland "regardless of what rate of pay was offered" (J.A. 55), the Company responded that it seemed ridiculous to go down a seniority list of 180 employees and discuss the prospects of Anderson employees who would not be interested in a transfer in any event (J.A. 205; 54–55).

On January 26, Union Regional Director Raymond Berndt and Company Attorney Thomas Logan met for an informal exchange of views (J.A. 206; 60–61). Berndt stated that the "economic make-up" of the Upland area and its distance from Anderson were such that it was a mistake to permit negotiations to "bog down" in a discussion of transfer rights. When Logan agreed, Berndt expressed his opinion that the "important thing was representation by some local of the United Auto Workers." Logan replied that he could see the advantages of UAW representation and suggested that their discussion follow that line, "keeping in mind that it was relatively academic to talk about transfer rights" in view of Berndt's opinion that "very few of the Union employees at Anderson

would care to come" to Upland (J.A. 61). They discussed the possibility of a contract without a provision concerning transfer rights, with a new UAW local (J.A. 61). Berndt gave Logan for study a copy of a contract executed by the Union and another employer located in another Indiana community (J.A. 62). A day or two later, Berndt asked Logan to confirm their conversation (J.A. 62).

By letter dated January 28, 1965, Logan complied with Berndt's request (J.A. 207, 181–182; 62–63, 136–140). Logan indicated that the Company was willing to recognize "a UAW–CIO Local at Upland" for a five-year contract, but was "not willing to recognize Shetterly [2] and his bargaining committee" with respect to the Upland plant. Logan also stated that the Company would bargain over each Anderson employee on the seniority list for employment at Upland, taking into account (1) his qualifications for the work; (2) physical condition; (3) mental outlook and attitude; (4) absentee record; and (5) job openings. Logan added that the Company would give severance pay to all employees with a minimum of ten years' service if they desired employment at Upland but were not hired, and those hired would retain their seniority. The letter closed with a suggestion that Berndt propose a formal contract, which Logan would immediately take up with the Company's Board of Directors (J.A. 207–208; 136–140).

[2] Union International Representative Shetterly had been the leading Union spokesman in the prior negotiations.

By letter dated March 10, 1965,[3] Berndt indicated acceptance of most of the Company's proposals, but expressed reservations or disagreement with respect to the remainder (J.A. 208–209, 183; 144–146). He stated that the Company's proposal that the parties bargain on the individual availability of all employees presently on the seniority list for employment at Upland was acceptable, so long as "physical shortcomings" already in existence at the time of the closing of the Anderson plant and the "mental outlook and attitude" displayed by some employees since the beginning of the strike would not be used to prevent their employment at Upland. He also stated that it was the Union's prerogative "to assign the Local Union number to any UAW bargaining unit" and a Union representative to any particular local. However, he conceded that it would be shortsighted for the Union to make an assignment that would only result in stalemates rather than fruitful negotiations. He closed by suggesting another meeting to settle their differences (J.A. 208–209, 183; 144–146).

During the next three months, no further correspondence ensued, nor did the Union request a bargaining meeting (J.A. 209, 183; 37, 64, 74–75). Meanwhile, the Company began to effect the removal of its operations. In April, it was able to occupy the newly-

[3] Events prior to February 25, 1965, occurred more than six months prior to the Union's filing of charges against the Company, and hence, under Section 10(b) of the Act (Pet. 23a, n. 1, 35a), may not themselves form the basis of an unfair labor practice finding. These events are recounted here solely to establish the background of the bargaining that occurred within the 10(b) period.

constructed plant in Upland; by August 1, the employee complement there was 212, and it never fell below 190 subsequently (Pet. 46a; J.A. 180–181; 10, 11, 51)..Only one of the employees who worked in the bargaining unit at Anderson also worked at Upland; all the other Upland employees were new. There was no evidence that any Anderson employee applied for employment at Upland (Pet. 46a; J.A. 181; 10–11, 51).

On June 15, 1965, with a Federal Mediator present, the parties discussed and settled the pension rights of Anderson employees who reached retirement age during the strike (J.A. 25, 56–57, 65). With respect to the transfer issue, Union Representative Shetterly stated that there were only about 75 employees on the picket line at Anderson, and that only about 50 percent of them would be interested in transferring to the Upland plant (J.A. 209; 57). The Union expressed the desire for further discussion of the transfer rights of the former Anderson employees on various occasions in the next five months (J.A. 209–210; 25–27, 148, 149, 151–153, 156–157). The Company indicated its willingness to meet, but took the position that the Anderson employees were not entitled to transfer as of right, and that the Union was not entitled to bargain for the employees at Upland unless it could establish that it had majority support there (J.A. 210, 184; 150–151, 154–155, 158).

On November 24, 1965, the parties again met with a Federal Mediator to discuss the possible transfer of Anderson employees to Upland. Union Representative Shetterly estimated that—after elimmating those em-

employees to the new plant (Pet. 2, Questions No. 1 and No. 3) boils down to whether substantial evidence supports the Board's finding (Pet. 35a), sustained by the court below (Pet. 40a, 41a), that the Company did in fact bargain with the Union about that subject. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491. In any event, the facts summarized in the Statement (*supra,* pp. 3–10) show that the Company bargained with the Union at length about the effects on the Anderson employees of the move to Upland, including the matter of transfer.

Petitioner claims that the decision below is in conflict with *Cooper Thermometer Co.* v. *National Labor Relations Board,* 376 F. 2d 684 (C.A. 2) (Pet 49a–60a). Since the Board's resolution of the issue was upheld in that case (with modification of remedies), as it was in the present case, the contention really is that the Board was in conflict with itself in the two decisions. In any event, there is no conflict. In *Cooper Thermometer,* as the Second Circuit found, the employer had, "in effect, ousted the union from any role in negotiating what might be offered to employees desiring to transfer" (Pet. 54a); *i.e.,* it had flatly refused to bargain about the transfer. Here, on the other hand, the Company was always willing to discuss with the Union the employment conditions that would be offered to employees who transferred and the general qualifications for transfer. Moreover, although the Company was initially reluctant to discuss the transfer potential of each individual employee

before knowing the employment requirements at the new plant and which employees would be willing to transfer, it ultimately offered to bargain about each Anderson employee on the seniority list and to submit to arbitration the question of which employees should be offered jobs at the Upland plant (*supra*, pp. 6–10).[5] In short, here the Company, after extensive bargaining, could not reach agreement with the Union about employee transfers, while in *Cooper Thermometer* the employer refused to negotiate with the union at all on the subject; the former is not a violation of the duty to bargain under the Act, while the latter is.[6]

2. Petitioner's further contention that it was entitled to represent the Upland employees without the necessity of establishing that it had the support of a majority of those employees rests on the premise that the Upland plant was just a continuation of the Anderson plant (Pet. 20). However, although many of the supervisory and clerical employees of the Ander-

[5] There is no substance to petitioner's contention (Pet. 22–24) that the Company, in effect, unilaterally discharged certain employees by stating that it would not rehire those who had not been delivering a fair day's work or who were guilty of strike misconduct. The Company's position was not taken unilaterally, but was the subject of extensive negotiations between the parties. Moreover, as a result of the bargaining, the Company receded from its initial position and proposed that an independent arbitrator determine, by objective standards, not only the issue of physical incapacity (see Pet. 23), but the entire question of which employees would be offered jobs at the Upland plant (J.A. 211; 30, 67–68).

[6] Chief Judge Bazelon, who dissented on the second issue (discussed *infra*), specifically agreed with the majority that *Cooper Thermometer* was distinguishable because there, unlike here, the employer had not bargained at all (Pet. 48a).

son plant transferred to Upland, the new plant was located about 35 miles from the old plant, it was apparent throughout the course of the bargaining negotiations that less than a majority of the Anderson production and maintenance employees were interested in transferring to Upland (*supra,* pp. 6–10), and only one such Anderson employee did in fact transfer (*supra,* p. 9). In these circumstances, the Board was reasonable in concluding that the presumption of continuing majority support which flowed from the Union's past status was rebutted. In contrast to the case of a mere move across the street, the Company here had a substantial basis for questioning whether the Union would represent the production and maintenance employees at Upland, and in thus refusing to recognize it as their representative, absent proof of majority support.

The cases cited by petitioner deal with situations where the union assertedly lost majority support within the first year of its certification (Pet. 20), or where an outstanding collective bargaining agreement barred a representation election to test the union's continued majority (Pet. 21). In these situations, it was necessary to accommodate the right of employee free choice to other valid policies—*i.e.,* the policy of giving certified unions a fair opportunity to achieve their bargaining aims (see *Brooks* v. *National Labor Relations Board,* 348 U.S. 96), or the policy of promoting industrial stability (*Leedom* v. *Int'l Bro. of Electrical Workers,* 278 F. 2d 237, 242 (C.A.D.C.)). There is no countervailing policy here which would justify a departure from the general principle that

employees have the right to choose their own bargaining representative and that a union is not entitled to recognition as the employees' exclusive representative absent a showing of majority support. See *Int'l Ladies Garment Workers Union* v. *National Labor Relations Board*, 366 U.S. 731, 737.[7]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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[7] Since, in view of the considerations set forth above, the Company was justified in refusing to recognize both petitioner International Union and its Local 940 as the representative of the Upland employees absent proof of majority support, there is no need to reach the propriety of the court of appeals' alternative ground of decision, *i.e.*, that the Company was in any event not obligated to recognize Local 940 since only the International had been certified as the bargaining representative (Pet. 41a–43a).

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